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THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: A SUMMARY AND DISCUSSION

by Daniel D. Coughlin

On November 17, 1993, the United States House of Representatives gave final approval to the North American Free Trade Agreement (NAFTA) and its side agreement on the Environment (Cooperation Agreement).¹ Within the following week, the United States Senate overwhelmingly passed the NAFTA and the Mexican Senate followed suit, clearing the last legislative hurdles to implementation of the treaty which creates the world's largest free-trade zone.² The NAFTA officially went into effect on January 1, 1994, and will

gradually eliminate most trade tariffs and non-tariff barriers to trade.³ Much of the debate prior to Congressional approval of the NAFTA centered on its potential to cause a loss of American jobs.⁴ Many are also concerned about the effect the agreement will have on the environments of all Parties⁵ to the NAFTA, especially along the Mexican-U.S. border.⁶ At the same time, some Americans felt that the NAFTA's provisions may threaten national sovereignty by preempting existing environmental regulations.⁷

After negotiation of the original NAFTA

text in 1992,⁸ many American commentators and environmentalists expressed concern over the possibility of accelerated environmental decay in Mexico under the treaty.⁹ Those concerns especially focused on the probability that Northern manufacturers would hasten their departure for Mexico to take advantage of cheaper labor costs and Mexico's weaker pollution laws and enforcement mechanisms.¹⁰ Such concerns are no doubt due to the recent deterioration of the border environment, caused in large part by new American manufacturing in the "maquiladora" area of Mexico.¹¹ Mexico has not vigorously enforced hazardous waste regulations in this northern border region of Mexico.¹² This helped transform many Mexican border cities into industrial wastelands.¹³ Environmentalists are concerned that the NAFTA's elimination of tariffs on imports to the U.S. will increase the flight of American manufacturers to the maquiladora region and exacerbate the pollution problem there.¹⁴ In his 1992 campaign, President Clinton called for a supplemental agreement protecting the environments of the NAFTA nations.¹⁵ The Cooperation Agreement pro-

¹ U.S. House of Representatives Passes North American Free Trade Agreement: NAFTA Backing is Key Win for Clinton, Facts on File World News Digest, Nov. 18, 1993, available in Westlaw, PTS-News database; North American Free Trade Agreement, Dec. 8, 11, 14, 17, 1992, U.S. Department of State, available in Westlaw, IEL database [hereinafter NAFTA]; North American Agreement on Environmental Cooperation, Sep. 13, 1993, Office of the U.S. Trade Representative, available in Westlaw, IEL database, implemented at 19 U.S.C. §3472 [hereinafter Cooperation Agreement].

² U.S., Mexican Senates Approve NAFTA, Facts on File World News Digest, Nov. 25, 1993; Helen Dewar, NAFTA Wins Final Congressional Test, WASH. POST, Nov. 21, 1993, at A1; Lars-Erik Nelson, Clinton Scores in His Own Endzone, NEWSDAY, Nov. 21, 1993, at 56.

³ William Carlile, NAFTA Opens Borders Like Never Before, ARIZ. REPUBLIC, Jan. 2, 1994, at A1; Carl F. Schwenker, Note, Protecting the Environment and U.S. Competitiveness in the Era of Free Trade: A Proposal, 71 TEX. L. REV. 1355, *3 (1993) (describing the general scope of the treaty).

⁴ See Maryanne Foronjy, Note, Mexico and the North American Free Trade Agreement—Growing Clean?, 4 FORDHAM ENVTL. L. REP. 211, *3-5 (1993); Schwenker, *supra* note 3, at *4-7. See also Jane Bussey, Teamsters See Trouble Down the Line, MIAMI HERALD-SUN, Dec. 5, 1993, at 1K; Richard Allen, DALLAS MORNING NEWS, Sep. 13, 1993, at 1D; Nelson, *supra* note 2; Anthony DePalma, Vague Mexico Wage Pledge Clouds Free Trade Agreement, N.Y. TIMES, Sep. 29, 1993, at A1; Scott Haggett, North American Free Trade Agreement Appears Ready to Fly, FIN. POST, Sep. 25, 1993, at 22; Richard Alm, Real Fight for Free Trade Begins Now in Congress, DALLAS MORNING NEWS, Aug. 19, 1993, at 1A.

⁵ Throughout this text the term "Party" or "Parties" refers to the national governments of Mexico, Canada, and the United States. This is also how the Cooperation Agreement refers to them. This should help distinguish these three governments from a general "third party". See generally Cooperation Agreement, *supra* note 1.

⁶ See Foronjy, *supra* note 4, at *3; Side Agreements to NAFTA Signed, 16 INT'L ENVTL. REP. 669 (BNA) (1993) [hereinafter Agreements Signed]; Steve Chamovitz, NAFTA: An Analysis of Its Environmental Provisions, 23 ENVTL. L. REP. 10067, *1-2 (1993); Mexican Border Utility Deal, N.Y. TIMES, October 13, 1993, at D5.

⁷ See Agreements Signed, *supra* note 6; Jima Ikegawa, Comment, NAFTA: How will it Affect U.S. Environmental Regulations?, 6 TRANSNT'S L. 225, *12-15 (1993).

⁸ The NAFTA was signed December 17, 1992 by former President George Bush, Mexican President Carlos Salinas de Gortari, and Canadian Prime Minister Brian Mulroney. See Anthony Balanza and Fasken C. Godfrey, Canadian Foreign Investment Review after NAFTA, 5 MERGERS & ACQUISITIONS IN CANADA, No. 9 (1993).

⁹ See *supra* notes 5-7 and accompanying text.

¹⁰ See Foronjy, *supra* note 4, at *13-14.

¹¹ *Id.*; "Maquiladora" is not defined in Spanish. See THE NEW WORLD SPANISH-ENGLISH AND ENGLISH-SPANISH DICTIONARY (1991). The name is used by commentators to describe the northern border region of Mexico where American manufacturers have recently moved their plants to use Mexican labor and import goods back to the U.S. See Foronjy, *supra* note 4, at *13. This is facilitated by an agreement between the two governments whereby U.S. companies may establish plants in Mexico and import raw materials for them duty-free. *Id.* They then send finished goods back to the U.S. or another country of the raw materials' origin. *Id.* If sent to the U.S., the goods re-enter the country duty-free as well, subject to a value added tax on the cost of finishing. *Id.* Though this industry experienced continual growth up until the NAFTA was implemented, it reached its peak from 1983-1988. *Id.* at *14.

¹² See Foronjy, *supra* note 4, at *14.

¹³ *Id.*

¹⁴ *Id.* at *4. See Kika de la Garza, Linking Trade Growth and the Environment, 23 ENVTL. L. 701 (1993) (urging President Clinton to provide a source of funding for cleaning up environmental problems in the border area).

¹⁵ Bill Clinton, Expanding Trade and Creating American Jobs, Address at North Carolina State University (Oct. 4, 1992), in 23 ENVTL. L. 683, 686 (1992).

vides a new and fairly comprehensive framework for the Parties to deal with such problems.¹⁶ The United States and Mexico also established a bilateral Border Environmental Cooperation Commission (BECC).¹⁷ The BECC deals with problems of cleaning up existing border pollution and preventing such pollution from growing as commerce grows there under the NAFTA.¹⁸

Initially, this Comment will provide an overview of the Cooperation Agreement which was supposed to allay environmentalists' fears about the impact of the original NAFTA. It then will outline chief concerns raised by environmentalists when the original NAFTA text was signed and discuss the extent to which the Cooperation Agreement satisfies these concerns.

PROVISIONS OF THE COOPERATION AGREEMENT

• The Commission

1. Council

The Cooperation Agreement establishes the Commission for Environmental Protection.¹⁹ It lays out the structure and functions of its main component, the Council.²⁰ The Cooperation Agreement requires that the Council be composed of cabinet-level representatives of the Parties and convene at least annually.²¹ Additionally, it provides that the Council must hold regular public meetings and that all of its decisions and recommendations must be public unless the Council specifically decides otherwise.²² The Council may create committees and may act to exercise "its functions as the Parties may

agree."²³ The U.S. Congress has allocated \$5 million to spend on the U.S.'s share of assessments to the operation of the Commission until 1996.²⁴

The Council serves as a forum for environmental discussion and promotes Party cooperation.²⁵ It oversees implementation of the Cooperation Agreement.²⁶ The Council also oversees the Secretariat and approves the Commission budget.²⁷ The Cooperation Agreement lists eighteen specific policy areas in which the Council should make considerations and recommendations related to environmental protection.²⁸ These include considering areas such as pollution techniques, specific pollution levels, and the sharing of environmental technology.²⁹

The Cooperation Agreement also re-

¹⁶ *NAFTA: Bentsen Offers Border Plan*, GREENWIRE, Sep. 14, 1993; *Agreements Signed*, *supra* note 6, at *2; Daniel Krainin, *Environmentalists Should Join in Vigorous Campaign for NAFTA*, ARIZ. REPUBLIC, Oct. 6, 1993, at B6. See also Jerry Taylor, *Baseless Fears of Accords*, WASH. TIMES, Sep. 9, 1993, at G3 (approving of the Cooperation Agreement because it appears to lack real teeth or power, not because it possesses power).

¹⁷ The agreement's official name is the "Agreement Between the Government of the United States of America and the United Mexican States Concerning the Establishment of a Border Environmental Cooperation Commission and a North American Development Bank", 1994 WL 46884 (Nov. 16, 18, 1993) [hereinafter BECC], implemented at 19 U.S.C. § 3473 (1993).

¹⁸ See Carol Browner, News Release, 1993 WL 438469 (E.P.A.).

¹⁹ Cooperation Agreement, *supra* note 1, art. 8. Funding for the Commission will be divided equally among the Parties. *Id.* art. 43.

²⁰ *Id.* arts. 9-10.

²¹ *Id.* art. 9(1)-(3). It must also hold special sessions at any Party's request. *Id.* art. 9(3)(b).

²² *Id.* art. 9(7).

²³ *Id.* art. 9(5)(a), (c).

²⁴ 19 U.S.C. § 3473(a)(2) (1993).

²⁵ Cooperation Agreement, *supra*, note 1, art. 10(1)(a), (f).

²⁶ *Id.* art. 10(1)(b).

²⁷ *Id.* art. 10(1)(c), (e).

²⁸ Cooperation Agreement, *supra*, note 1, art. 10(2)(a)-(s). They include the following:

- (a) comparability of techniques and methodologies for data gathering and analysis, data management and electronic data communications on matters covered by this Agreement;
- (b) pollution prevention techniques and strategies;
- (c) approaches and common indicators for reporting on the state of the environment;
- (d) the use of economic instruments for the pursuit of domestic and internationally agreed environmental objectives;
- (e) scientific research and technology development in respect of environmental matters;
- (f) promotion of public awareness regarding the environment;
- (g) transboundary and border environmental issues, such as the long-range transport of air and marine pollutants;
- (h) exotic species that may be harmful;
- (i) the conservation and protection of wild flora and fauna and their habitat, and specially protected natural areas;
- (j) the protection of endangered and threatened species;
- (k) environmental emergency preparedness and response activities;
- (l) environmental matters as they relate to economic development;
- (m) the environmental implications of goods throughout their life cycles;
- (n) human resource training and development in the environmental field;
- (o) the exchange of environmental scientists and officials;
- (p) approaches to environmental compliance and enforcement;
- (q) ecologically sensitive national accounts;
- (r) eco-labelling; and
- (s) other matters as it may decide.

²⁹ *Id.*

quires the Council to cooperate with the NAFTA Free Trade Commission.³⁰ The Council must provide consultation when one Party believes another is lowering its environmental standards to attract investment.³¹ In this consultation, the Cooperation Agreement mandates that the Council discourage such activity.³² In other environmentally-related trade disputes, the Council must try to get the Parties to avoid the dispute, make recommendations to the Free Trade Commission to identify technical experts to help the situation, and aid the Commission in any other way.³³

When government projects may have international environmental effects, the Council must advise the Parties involved.³⁴ If a project is likely to produce adverse effects in another Party's territory, the Council is required to make an environmental impact assessment of the project and recommend steps to mitigate the potential adverse effects.³⁵

The Council must encourage the establishment of national administrative channels by the Parties to seek the prevention or reduction of "transboundary pollution on a reciprocal basis."³⁶ To this end, it is required to develop recommendations regarding ac-

cess to courts and administrative remedies by residents of a foreign Party.³⁷ This includes recommendations regarding rights and remedies in those venues.³⁸ The Council is also required to encourage the Parties to enforce their own laws and promote technical cooperation among themselves.³⁹ It must also promote public access to governmental information on the environment.⁴⁰

2. The Secretariat

The Cooperation Agreement sets forth provisions for the Secretariat. The Executive Director runs the Secretariat and is elected to non-consecutive three-year terms.⁴¹ The Executive Director is given the power to head and appoint, subject to the Council's veto, a staff chosen from a list of candidates prepared by the Parties.⁴² The office of Executive Director rotates among citizens of each of the Parties.⁴³ Members of the Secretariat may not receive any influence or instructions from their home country when performing their duties.⁴⁴ The Secretariat prepares the budget and submits it for approval to the Council.⁴⁵ The Secretariat also must provide technical and operational support to both the Council and individual Parties.⁴⁶

The Secretariat must prepare and release the annual report of the Commission, subject to review by the Council.⁴⁷ The content of this report includes the Commission's activities and budget as well as a periodic report on the state of the Parties' environments.⁴⁸ Additionally, the report must contain information on Party compliance with the Cooperation Agreement, including environmental enforcement.⁴⁹ Finally, the Secretariat may promulgate its own environmental reports, unless the Council objects or the subject involves the failure of a Party to enforce its own laws.⁵⁰

3. The Joint Public Advisory Committee

The Agreement establishes the Joint Public Advisory Committee (Committee), which must be comprised of 15 members selected by each Party's National Advisory Committee.⁵¹ The Committee meets at least once a year and may advise the Council on technical, budgetary, or other information which the Secretariat prepares.⁵² The Committee may also provide its own information to the Secretariat.⁵³

³⁰ *Id.* art. 10(6).

³¹ *Id.* art. 10(6)(b).

³² *Id.*

³³ *Id.* art. 10(6)(c).

³⁴ *Id.* art. 10(7).

³⁵ *Id.*

³⁶ *Id.* art. 10(8).

³⁷ *Id.* art. 10(9).

³⁸ *Id.*

³⁹ *Id.* art. 10(4).

⁴⁰ *Id.* art. 10(5).

⁴¹ *Id.* art. 11(1).

⁴² *Id.* art. 11(2)(3). The list must be prepared with "due regard" to selecting an "equitable" proportion of nationals from each Party. *Id.* art. 11(2)(c).

⁴³ *Id.* art. 11(1).

⁴⁴ *Id.* art. 11(4).

⁴⁵ *Id.* art. 11(6).

⁴⁶ *Id.* art. 11(5), (7). The Secretariat shall keep in confidence information which non-governmental entities submit to it as confidential. *Id.* art. 11(8).

⁴⁷ *Id.* art. 12(1).

⁴⁸ *Id.* art. 12(2)(a), (b), (e), (f), (3).

⁴⁹ *Id.* art. 12(2)(c). Additionally, non-governmental information and Commission recommendations should be included. *Id.* art. 12(2)(c)-(d).

⁵⁰ *Id.* art. 13.

⁵¹ *Id.* art. 16(1). Article 17 suggests that the Parties set up these committees to advise their governments on the implementation and elaboration of the Agreement.

⁵² *Id.* art. 16(3)(5). The Secretariat is required to provide copies of proposed budgets and other documents that it prepares. *Id.* art. 16(6). Also factual records may be made available to the Committee by a two-thirds vote of the Council. *Id.* art. 16(7).

⁵³ *Id.* art. 16(5). All reports must be provided in French, English, and Spanish. *Id.* art. 19. The actual text of the Cooperation Agreement in each of these languages are equally authentic. *Id.* art. 51.

• Objectives

The Cooperation Agreement begins listing objectives in the Preamble.⁵⁴ The Preamble consists of one page of notable positions of the Parties.⁵⁵ The Parties initially proclaim their "sovereign right" to exploit their own resources.⁵⁶ This right is restricted to exploitation which does not damage environments outside of each Party's national boundaries.⁵⁷ The Parties also "re-affirm" the 1972 Stockholm Declaration on the Human Environment and the Rio Declaration of 1992.⁵⁸ The United States did not sign the latter treaty.⁵⁹ Under the NAFTA, the Parties apparently may act in accordance with certain provisions of selected environmental pacts.⁶⁰ The Parties similarly "reconfirm" the environmental goals and objectives, including environmental enhancement, in the original NAFTA.⁶¹ The Preamble concludes by noting that the Parties are

"convinced of the benefits to be derived from a framework, including a Commission," to foster environmental conservation and enhancement.⁶²

The Cooperation Agreement provides a specific list of objectives, labeled as such, stating the general goals of the Parties, including some listed in the Preamble.⁶³ They agree to foster conservation and improvement of the environment and promote sustainable development with "mutually supportive environmental and economic policies."⁶⁴ They plan to achieve this by enhancing and strengthening environmental regulations, enforcement, and cooperation between them.⁶⁵ The Parties also pledge to support the environmental goals of the NAFTA and "avoid creating trade distortions or new trade barriers . . ."⁶⁶ None of these objectives is accompanied by any type of penalty provision.⁶⁷

• General Obligations

The Cooperation Agreement creates some general obligations for the Parties. First, they agree that each will prepare public reports on the state of the environment, although the Agreement does not say how often these are required.⁶⁸ The Parties also agree to "develop and review environmental emergency preparedness measures" and promote education and the research of environmental matters.⁶⁹ The Cooperation Agreement also requires Parties to conduct environmental impact assessments and to use economic tools to reach environmental goals most efficiently.⁷⁰

The Cooperation Agreement states that each Party must consider any recommendation regarding a specific pollutant level made by the Council.⁷¹ Each Party must also consider prohibiting the export to other Parties of chemicals which are banned in its own country.⁷² The Agreement requires

⁵⁴ *Id.* Preamble.

⁵⁵ *See id.*

⁵⁶ *Id.* This right was previously declared in the Stockholm and Rio de Janeiro Declarations on the environment. *See infra* notes 58-59 and accompanying text. *See also* Ranee Khooshie Lal Panjabi, *From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law*, 21 *DEW. J. INT'L L.* 215, 229-30 (1993).

⁵⁷ Cooperation Agreement, *supra* note 1, Preamble.

⁵⁸ *Id.* The Stockholm Declaration of the United Nations Conference on the Human Environment, consisting of twenty-six principles and a preamble was the first major international environmental treaty. *See* Panjabi, *supra* note 56, at 216. The Rio Declaration on Environment and Development is a more far reaching document on the environment. *Id.* at 273. Former President Bush refused to sign the agreement despite severe criticism by environmentalists. He claimed that certain provisions threatened the American biotechnology industry. *Id.* at 245 n.118.

⁵⁹ Panjabi, *supra* note 56, at 245 n.118.

⁶⁰ David Voigt, Note, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, 2 *MINN. J. GLOBAL TRADE* 323, *17-18 (1993). The original NAFTA provided that obligations of the Parties regarding endangered species, ozone-depleting substances, and hazardous wastes under specified international agreements will take precedence over NAFTA provisions. *See* Eleanor Roberts Lewis, *The North American Free Trade Agreement: Historical Background and Summary of the Fast Track Process*, 653 *PRAC. L. INST./COMM.* 23, at end (1993). *But see generally* James E. Bailey, *Free Trade & the Environment - Can NAFTA Reconcile the Environment?*, 8 *AM. U. J. INT'L L. & POL'Y* 839 (1993). However, only certain environmental provisions of selected treaties will take precedence over the NAFTA. Voigt, *supra* this note.

⁶¹ Cooperation Agreement, *supra* note 1, Preamble. *See infra* note 200 and accompanying text for a criticism of the NAFTA's lack of environmental goals.

⁶² Cooperation Agreement, *supra* note 1, Preamble. In the Preamble the Parties also note that they are:

CONVINCED of the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations;

EMPHASIZING the importance of public participation in conserving, protecting, and enhancing the environment;

NOTING the existence of differences in their respective natural endowments, climatic and geographical conditions, and economic, technological and infrastructural capabilities; [and]

RECALLING their tradition of environmental cooperation and expressing their desire to support and build on international environmental agreements and existing policies and laws, in order to promote cooperation between them"

Id.

⁶³ *Id.* art. 1.

⁶⁴ *Id.* art. 1(b).

⁶⁵ *Id.* art. 1(c), (f)-(j).

⁶⁶ *Id.* art. (d)-(e). They also agree to promote "transparency and public participation in the development of environmental laws, regulations and policies . . . economically efficient and effective environmental measures; and . . . pollution prevention policies and practices." *Id.* art. (h)-(j).

⁶⁷ *Id.*

⁶⁸ *Id.* art. 2(1)(a).

⁶⁹ *Id.* art. 2(1)(b)-(d).

⁷⁰ *Id.* art. 2(1)(e)-(f).

⁷¹ *Id.* art. 2(2). *See* articles 9 and 10 for a general description of the Council.

⁷² *Id.* art. 2(3).

each Party to give notice of such banned substances and other highly restricted substances.⁷³

A further provision of the Cooperation Agreement requires each Party to provide "high levels" of environmental protection and to continually enhance that protection.⁷⁴ However, the Parties recognize again that each has the right to set its own levels of protection.⁷⁵ Each Party shall publish all legal and regulatory measures and proposals relating to the Cooperation Agreement, and if possible, provide individuals and each Party a right to be heard on such proposals.⁷⁶

The Cooperation Agreement suggests that the Parties amicably reconcile any differences arising under its provisions.⁷⁷ The only mandatory provision for this suggestion, however, is that a Party must provide information which another Party requests if it pertains to environmental measures.⁷⁸ The Parties must also provide information requested by the Council or Secretariat, unless doing so violates that Party's law or the Party considers it unduly burdensome.⁷⁹

• Enforcement of Environmental Laws

1. In General

The Cooperation Agreement requires each Party to enforce its own environmental

laws and then provides a list of suggested actions, such as the appointing of inspectors and the issuance of permits and licenses.⁸⁰ Each Party must have a working form of enforcement proceedings and sanctions.⁸¹ The Cooperation Agreement also provides a list of suggested sanctions.⁸²

The Cooperation Agreement provides other general enforcement rules. No official of one Party may enforce environmental laws in another Party's territory.⁸³ The Cooperation Agreement also prohibits a Party from providing a remedy in its own laws for violations of this agreement by another Party.⁸⁴ But, private persons shall be able to request state investigation of environmental violations and have access to available judicial or administrative remedies.⁸⁵ Such remedies must include private lawsuits for damages and injunctions, sanctions, monetary penalties, plant closures, emergency orders to mitigate damages, and requests to protect the environment according to a Party's law.⁸⁶ If a Party believes another Party is persistently failing to enforce its environmental laws, the Cooperation Agreement provides a resolution process for the dispute, described below, which includes possible penalties.

2. Procedure

The Cooperation Agreement includes a separate article on Procedural Guarantees. The guarantees require that the above-mentioned dispute proceedings: (1) "comply with due process of law;" (2) are generally open to the public; (3) allow the litigants to support their position with evidence; (4) are not unreasonably expensive, complicated, or lengthy; and (5) are governed by impartial tribunals.⁸⁷ The Cooperation Agreement also requires written decisions based on the evidence heard in such proceedings, and the opportunity for review.⁸⁸

No provision of the Cooperation Agreement requires a Party to disclose confidential government information or any privately protected information.⁸⁹ Nor are the Parties required by any provision to disclose information related to their National Security or take any actions which would compromise national defense or the implementation of any nuclear arms treaties.⁹⁰ The Cooperation Agreement does require the Commission to handle any information held in confidence in the same manner as the Party providing it handles it.⁹¹

The Cooperation Agreement provides a few rules of diplomacy.⁹² It requires the Parties to extend those "privileges and im-

⁷³ *Id.*

⁷⁴ *Id.* art. 3.

⁷⁵ *Id.*

⁷⁶ *Id.* art. 4. This includes all "laws, regulations, procedures and administrative rulings" and any such proposed measures. *Id.*

⁷⁷ *Id.* art. 20(1), (2), (4).

⁷⁸ *Id.* art. 20(3).

⁷⁹ *Id.* art. 21(1)-(2). If the latter, the Secretariat shall revise the question, but the Party may still refuse if it supplies its reasons to the Secretariat. *Id.* art. 21(2)-(3).

⁸⁰ *Id.* art. 5(1). Other suggested mechanisms include: (1) monitoring compliance and investigating suspected violations, including through on-site inspections, (2) seeking assurances of voluntary compliance and compliance agreements, (3) publicly releasing noncompliance information, (4) issuing bulletins or other periodic statements on enforcement, (5) promoting environmental audits, (6) requiring record keeping and reporting, (7) providing or encouraging mediation and arbitration, (8) initiating judicial, quasi-judicial, or administrative proceedings to seek appropriate sanctions or remedies, (9) providing for search, seizure or detention, or (10) issuing administrative orders, including preventative, curative or emergency orders. *Id.*

⁸¹ *Id.* art. 5(2) - (3).

⁸² *Id.* art. 5(3). The list includes "compliance agreements, fines, imprisonment, injunctions, the closure of facilities, and the cost of containing or cleaning up pollution." *Id.* art. 5(3)(b).

⁸³ *Id.* art. 37.

⁸⁴ *Id.* art. 38.

⁸⁵ *Id.* art. 6(2).

⁸⁶ *Id.* art. 6(3).

⁸⁷ *Id.* art. 7(1), (4).

⁸⁸ *Id.* art. 7(2)-(3).

⁸⁹ *Id.* art. 39(1).

⁹⁰ *Id.* art. 42.

⁹¹ *Id.* art. 39(2).

⁹² See *id.* art. 44.

nunities" to the Executive Director and the Secretariat's staff which are "necessary for the exercise of their functions."⁹³

Under the Cooperation Agreement, non-governmental parties may request that the Council investigate alleged non-enforcement of environmental laws by a Party.⁹⁴ Such requests must be written by a clearly identifiable entity from one of the Parties, provide sufficient information for the Secretariat to review, and be aimed at "promoting enforcement rather than at harassing industry."⁹⁵ The submission must indicate that the complainant has notified her own national authorities.⁹⁶ If these criteria are met, the Secretariat may request a response from the Party.⁹⁷ The decision to make this request will be based on the following factors: (1) whether the request alleges harm to the complainant; (2) whether the submission raises issues which, with further study, could further the Cooperation Agreement's goals; (3) if private remedies have already been pursued; and (4) if "the submission is drawn exclusively from mass media reports."⁹⁸ If a response is requested, the Party will normally have 30 days to indicate whether the matter is pending in another proceeding. If it wishes to, it may additionally indicate whether the matter was previously pursued in a judi-

cial or administrative proceeding or whether such a proceeding is still available to the complainant.⁹⁹

After review of a Party response, the Council may instruct the Secretariat to prepare a factual record or do so on its own initiative.¹⁰⁰ A Party may comment on the first draft of such a record and the Secretariat may incorporate appropriate comments into its final submission to the Council.¹⁰¹

3. Consultations

The Cooperation Agreement sets out important provisions for consultations and dispute resolution by Parties where one Party alleges a failure by another to enforce its own environmental law.¹⁰² The first requirement is that the complaining Party request consultation with the Party or Parties which it believes has exhibited a consistent pattern of failing to enforce its own environmental law.¹⁰³ The Cooperation Agreement gives a negative definition for failing to effectively enforce its own environmental law.¹⁰⁴ A Party has not failed to enforce its own laws when a Party's actions reflect a "reasonable exercise of [its] discretion" in enforcement actions, or when those actions reflect "bona fide decisions to allocate resources" to other areas of environmental enforcement.¹⁰⁵ It

defines "environmental law" as any provision of a statute or regulation with the primary purpose of protecting the environment or preventing danger to humans caused by pollutants, environmental contaminants, and hazardous or toxic substances or wastes.¹⁰⁶ It excludes provisions directly related to worker safety or health and some relating to harvesting natural resources, which is an area commonly thought of as environmental law.¹⁰⁷ Generally, a third Party may join in consultations if it has an interest in the outcome.¹⁰⁸

If the Parties are unable to resolve their dispute within a specified time period,¹⁰⁹ any disputant may request a special Council session.¹¹⁰ Upon such request, the Council will convene and may use dispute resolution techniques such as mediation, or it can call experts to aid in consultation.¹¹¹ It may also make public or private recommendations or refer the Parties back to any separate agreement which "more properly cover[s]" the matter.¹¹²

4. Arbitration

If the matter is not resolved within 60 days after the Council has assembled, the Council may convene an "arbitral panel" if the alleged failure relates to a situation in-

⁹³ *Id.* art. 44.

⁹⁴ *Id.* art. 14.

⁹⁵ *Id.* art. 14(1)(a)-(d), (f).

⁹⁶ *Id.* art. 14(1)(e).

⁹⁷ *Id.* art. 14(2).

⁹⁸ *Id.*

⁹⁹ *Id.* art. 14(3). The Cooperation Agreement defines "judicial or administrative proceeding" as a domestic judicial, quasi-judicial, or administrative action including mediation, arbitration, licensing, "seeking an assurance of voluntary compliance or a compliance agreement", and issuing an administrative order. *Id.* art. 45(3). Also included is an "international dispute resolution proceeding" involving the Party as a party. *Id.*

¹⁰⁰ *Id.* art. 15(1)-(2). Note that Annex 41(2) requires the Council to take into account whether the request was submitted by a Canadian organization organized under the laws of a province which paragraph 1 of the Annex requires to be listed. See *infra* notes 157-163 and accompanying text.

¹⁰¹ Cooperation Agreement, *supra* note 1, art. 15(5)-(6). The Council may only make such report public by a two-thirds vote. *Id.* art. 15(7).

¹⁰² See generally *id.* arts. 22-36.

¹⁰³ *Id.* art. 22(1)-(2). A "persistent pattern" means "a sustained or recurring" pattern of action or lack of action beginning after the time which the NAFTA took effect, January 1, 1994. *Id.* art. 45(1).

¹⁰⁴ *Id.* art. 45(1).

¹⁰⁵ *Id.* art. 45(1)(a), (b).

¹⁰⁶ *Id.* art. 45(2)(a). Protection of the environment also includes protecting "wild flora or fauna, including endangered species, their habitat, and specially protected natural areas. . . ." *Id.*

¹⁰⁷ *Id.* art. 45(2)(a)(iii), (b). It excludes "any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources." *Id.* art. 45(2)(b). The Agreement states that the primary purpose of such a provision will be defined by the provision's purpose alone, not the purpose of the whole statute. *Id.* art. 45(2)(c).

¹⁰⁸ *Id.* art. 22(3). Subsection 3 allows the third Party joinder unless the Council's rules prohibit it. *Id.*

¹⁰⁹ Usually this period is 60 days unless otherwise agreed to by the disputants. *Id.* art. 23(1)-(3).

¹¹⁰ *Id.* The consulting Parties may set their own timetable if desired. *Id.* art. 23(1).

¹¹¹ *Id.* art. 23(4)(a)-(b). The Council will normally convene within 20 days unless it decides otherwise. *Id.* art. 23(3).

¹¹² *Id.* art. 23(5).

volving some type of trade between the Parties.¹¹³ The panel shall be comprised of five individuals selected by the Parties from a roster of up to 45 independent members chosen by the Council.¹¹⁴ The roster members shall have an area of expertise in environmental law or a field related to the dispute.¹¹⁵ In a two-Party dispute, both Parties are supposed to jointly choose a panel chairperson and then each choose two other roster members from their opponent's Party.¹¹⁶ If the Parties cannot agree on panelists, the Cooperation Agreement provides a system of lots for their selection.¹¹⁷ If there are three Parties involved, the process is roughly the same.¹¹⁸

The panel's proceedings are governed by rules established by the Council.¹¹⁹ These rules must include: (1) a right to be heard; (2) the right to make written initial and rebuttal submissions; and (3) a prohibition against disclosing the identity of the author of majority or minority panel opinions.¹²⁰ The general purpose of the panel shall be to examine alleged non-enforcement and make findings of fact and recommendations for resolution of the dispute.¹²¹ The Cooperation Agreement also provides that a third Party may attend all hearings and make submissions to

the panel.¹²² The panel may also seek expert advice from appropriate persons, but only if the disputants agree.¹²³

The panel is normally required to submit an initial report to the Parties within 180 days of convening.¹²⁴ The report shall contain any findings of fact, determinations of whether there has been an enforcement failure, recommendations, and any dissent.¹²⁵ The Parties may then make written comments on the report, and the panel, pursuant to these reports, may reconsider their report or make a further investigation.¹²⁶ The panel then sends its final report to the disputants, who each must send it to the Council for publication along with any extra notes they desire to be added.¹²⁷

If the panel finds lack of enforcement by a Party, the disputants may agree on a plan which implements the panel's recommendations and notify the Council and Secretariat of the plan.¹²⁸ Any disputant may request the Council to reconvene the panel if the disputants cannot agree to a plan of action within 60 days of the final report, or if a complaining Party feels that the defendant Party is not completely implementing such a plan after at least 180 days since the time of the plan.¹²⁹ If the Parties cannot agree to a

plan within 60 days of the final report, the last plan submitted by the defendant is deemed established by the panel.¹³⁰ When the panel is reconvened because the Parties could not reach an agreement, the panel must determine the sufficiency of the defendant Party's implementation proposal.¹³¹ If insufficient, the panel must establish its own plan and may assess a monetary enforcement according to Article 34 of the Cooperation Agreement.¹³² When it is reconvened for allegations of non-implementation, the panel must decide whether the defendant Party is fully implementing the plan agreed to, and, if not, must make some monetary enforcement assessment against that Party.¹³³ The Council must reconvene the panel if a complaining Party makes another timely written request to determine the sufficiency of a defendant Party's implementation program.¹³⁴

The Cooperation Agreement limits the amount of a monetary enforcement assessment against any Party to \$20 million in the first year of the Cooperation Agreement.¹³⁵ After the first year, the limit shall be the equivalent of seven thousandths of the total trade between the Parties in the most recent year in which statistics have been compiled.¹³⁶ The factors which the panel shall

¹¹³ *Id.* art. 24(1). A third Party may join the complaining Party within seven days of the panel's formation. *Id.* art. 24(2).

¹¹⁴ *Id.* arts. 25-27. Individuals may not serve as panelists if they have participated in the dispute or they or their organization has an interest in the matter. *Id.* art. 26(2). If a Party selects a non-roster panelist, another Party may offer a "peremptory challenge" to that person. *Id.* art. 27(3). If the panelist is believed to be in violation of the code of conduct established by the Council, the Parties involved shall consult and may jointly remove the panelist. *Id.* art. 27(4).

¹¹⁵ *Id.* art. 25(2)(a).

¹¹⁶ *Id.* art. 27(1).

¹¹⁷ *Id.* art. 27(1)(d).

¹¹⁸ *Id.* art. 27(2)(c).

¹¹⁹ *Id.* art. 28(1).

¹²⁰ *Id.*

¹²¹ *Id.* art. 28(3). This shall be the purpose unless the Parties agree otherwise shortly after the panel is convened. *Id.*

¹²² *Id.* art. 29.

¹²³ *Id.* art. 30.

¹²⁴ *Id.* art. 31(2)(a).

¹²⁵ *Id.* art. 31(2)(3).

¹²⁶ *Id.* art. 31(4)-(5).

¹²⁷ *Id.* art. 32(1)(3); The panel must submit this report within 60 days of its initial report unless the Parties agree on different time limit for the panel. *Id.* art. 32(1).

¹²⁸ *Id.* art. 33.

¹²⁹ *Id.* art. 34(1)-(2). The disputants have 60 days to reach an agreement. *Id.* art. 34(1). If there is neither an agreement nor such a request within 120 days, the last plan submitted by the defendant shall be deemed the final panel plan. *Id.* art. 34(2).

¹³⁰ *Id.* art. 34(2). It is deemed established 120 days after the final report. *Id.*

¹³¹ *Id.* art. 34(4)(a).

¹³² *Id.* art. 34(4)(a)(ii), (b). The panel has 90 days from when it reconvenes to make such an assessment. *Id.* art. 34(4). For a summary of Annex 34, see *infra* text accompanying notes 135-138.

¹³³ Cooperation Agreement, *supra* note 1, art. 34(5). The panel may make such an assessment within 60 days of reconvening unless the Parties agree otherwise. *Id.* art. 34(4). The deadline for Parties to file because of a failure to implement a plan shall be 180 days from when the Parties made an agreement or the panel adopted a plan. *Id.* art. 34(3).

¹³⁴ *Id.* art. 35. The time limit for such requests is 180 days from the time of the previous determination of sufficiency. *Id.*

¹³⁵ *Id.* annex 34(1).

¹³⁶ *Id.* Trade volume between the U.S. and Mexico totaled \$65 billion in 1991. Schwenker, *supra* note 3, at 1364 n.52.

consider in making its assessments include: (1) the pervasiveness and length of time which the Party has failed to enforce its environmental laws; (2) the expected level of enforcement considering that Party's resources; (3) any reasons given for such failure; (4) efforts to rectify the situation; and (5) any other relevant factors.¹³⁷ Such assessments are to be paid into a fund in the Commission's name and expended at the Council's direction to improve the defendant Party's environment or environmental enforcement mechanisms, consistent with its laws.¹³⁸

5. Suspension of Benefits

The Cooperation Agreement provides measures to be taken when a Party fails to pay a monetary assessment within 180 days of imposition.¹³⁹ When this occurs, a complaining Party may, with certain exceptions, suspend the application of NAFTA trade benefits to the defendant Party, up to the amount assessed.¹⁴⁰ A complaining Party may also suspend benefits if the arbitral panel assesses a penalty based on the defendant Party's failure to implement the panel's plan.¹⁴¹ When the panel makes an assessment for that reason,¹⁴² the complaining Party may only suspend benefits if: (a) the

defendant Party has been previously assessed a penalty under Article 34, or (b) the panel has previously been required to construct a plan of action pursuant to a Party request.¹⁴³ The suspending nation may increase its tariffs to no higher than the lesser of the applicable tariff rate existing immediately before the NAFTA took effect, or the Most-Favored-Nation rate as of the date of suspension.¹⁴⁴ In considering which benefits to suspend, the suspending Party shall first attempt to suspend benefits in those economic sectors which the defendant Party has had persistent enforcement failure, unless they consider it impracticable.¹⁴⁵

When benefits are suspended, the defendant Party may reconvene the panel to determine whether an alleged deficiency has been paid or whether the Party has actually implemented its plan.¹⁴⁶ Within 45 days, the panel shall issue its report and shall terminate the suspension of benefits if it finds that the defendant has complied.¹⁴⁷ The defendant Party may also cause the panel to reconvene to determine whether the actual suspension of benefits exceeds the amount of the assessed enforcement.¹⁴⁸

There are special provisions for collection of assessments and enforcement of panel determinations in Canada.¹⁴⁹ Those

assessments directed at Canada must be collected by the Commission filing a certified copy of the panel's decision in a Canadian Court of competent jurisdiction.¹⁵⁰ The Commission may file only if Canada has failed to pay an assessment after 180 days, after which time the filing becomes an "order of the court."¹⁵¹ The Commission shall file the panel's decision as a complaint addressed to either "her Majesty in right of Canada or . . . in right of the province concerned."¹⁵² The proceedings shall be "summary" in nature and are not reviewable by Canadian courts.¹⁵³ When any panel makes a determination that Canada shall fully implement a panel plan,¹⁵⁴ the court where the Commission files shall refer any questions of fact or interpretation back to the deciding panel for final review.¹⁵⁵ If Canada alters these procedures it shall be considered to have breached the Cooperation Agreement.¹⁵⁶

There are also special provisions for Canada's provinces.¹⁵⁷ Canada must declare which of its provinces it will agree to be bound to for matters in their jurisdiction.¹⁵⁸ This declaration relates back to certain Articles of the Cooperation Agreement.¹⁵⁹ Any unlisted province will limit Canada's powers to help it under the Cooperation Agreement. Canada will not be able to request: (a) consul-

¹³⁷ See Cooperation Agreement, *supra* note 1, annex 34(2).

¹³⁸ See *id.* annex 34(3).

¹³⁹ *Id.* art. 36(1).

¹⁴⁰ *Id.* Any suspension is subject to Annex 36, discussed *infra* notes 149-156 and accompanying text. *Id.* Also where the assessment was made pursuant to Article 34(5)(b), benefits may be suspended by another route by Article 36(2) and should not be withheld twice. *Id.* art. 36(1)(b). If more than one Party undertakes any such suspension in lieu of payment, the combined amount of benefits suspended shall not exceed that assessed. Cooperation Agreement, *supra* note 1, art. 36(3).

¹⁴¹ Cooperation Agreement, *supra* note 1, art. 36(2).

¹⁴² See *id.* art. 34(5)(b).

¹⁴³ *Id.* art. 36(2). See *id.* art. 34, and *supra* notes 129-136, and accompanying text for information regarding a panel's duty to construct a plan of action. Note that the suspension is still subject to Annex 36. *Id.* art. 36(2).

¹⁴⁴ See Cooperation Agreement, *supra* note 1, annex 36(B)(1).

¹⁴⁵ *Id.* annex 36(B)(2).

¹⁴⁶ *Id.* art. 36(4).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* art. 36(5). The panel again has 45 days to make its report. *Id.*

¹⁴⁹ See *id.* annex 36A.

¹⁵⁰ See *id.* annex 36A(2).

¹⁵¹ See *id.* annex 36A(2)(a)-(b).

¹⁵² See *id.* annex 36A(2)(d) and annex 41(6).

¹⁵³ See *id.* annex 36A(2)(e), (g)-(h).

¹⁵⁴ See *id.* art. 34(5)(b).

¹⁵⁵ See *id.* annex 36A(2)(f).

¹⁵⁶ See *id.* annex 36A(4).

¹⁵⁷ See *id.* annex 41.

¹⁵⁸ *Id.* annex 41(1). Canada was supposed to provide such a list by January 1, 1994 but has not done so as of this writing. See *id.* See also *Canadian Provinces Virtually Exempt from Pact's Environmental Side Accord*, Int'l Env't Daily (BNA), Jan. 25, 1994 [hereinafter *Provinces Exempt*]. Environmentalists have serious doubts whether many provinces will join now. *Id.*

¹⁵⁹ See e.g. Cooperation Agreement, *supra* note 1, art. 15.

tations under Article 22; (b) a Council meeting under Article 23; or (c) an arbitral panel under Article 24, if such request is primarily for a non-declared province.¹⁶⁰ Nor may Canada request (b) or (c) unless the same matter would arise under Canadian federal jurisdiction in its territory, or the declared provinces account for at least 55% of Canada's Gross Domestic Product, or in the same industry in question in Canada, the declared provinces account for at least 55% of the national output.¹⁶¹ Likewise, however, no Party may make a request concerning an enforcement failure of a province unless the province is declared under paragraph 1 and meets the above-mentioned percentile standards.¹⁶² After two years of operating under the Cooperation Agreement, the Council shall look at the effectiveness of the provisions contained in this paragraph, especially the percentage thresholds just mentioned.¹⁶³

6. Implementation and Withdrawal

The Cooperation Agreement became effective January 1, 1994.¹⁶⁴ The Parties may now agree to any amendments as long as their internal legal processes for accepting such amendments are satisfied.¹⁶⁵ The Cooperation Agreement also allows "accession" of new nations to the Cooperation Agreement by agreement of the Council and those nations seeking to join.¹⁶⁶ Also a Party may withdraw from the Cooperation Agree-

ment six months after giving written notice of its intentions.¹⁶⁷

CRITICISMS OF THE ORIGINAL NAFTA AND THE COOPERATION AGREEMENT'S RESPONSE

Former President Bush declared that the original NAFTA maintained the U.S.'s "high environmental, health, and safety standards."¹⁶⁸ Yet there are several environmental areas in which critics say the NAFTA is deficient.¹⁶⁹ Some of these concerns were addressed by the subsequent Cooperation Agreement while others were not.

• The Commission

Before the Cooperation Agreement existed, commentators stated that one of the most serious deficiencies in the original NAFTA text was the lack of any environmental rulemaking body for the Parties.¹⁷⁰ One commentator, Steve Chamovitz, suggested a tripartite commission which would be represented by Party governments, businesses, and members of the general public.¹⁷¹ This commission would recommend environmental policies and standards to individual Parties who would retain the right to accept or reject them.¹⁷²

The Cooperation Agreement's Commission appears to fit this bill in most respects. The Council and Committee are represented by all three Parties and the head

of the Secretariat rotates among them.¹⁷³ While the Council must be composed of government officials, members of the public are supposed to make up the membership of the Committee. There is no specific inclusion of business officials, but they are not excluded either. While Chamovitz envisioned environmentalists and business-persons working side-by-side with bureaucrats,¹⁷⁴ the Commission separates them a bit. More importantly, the Commission is empowered to seek technical advice and make recommendations on general and specific environmental standards and practices. It generally appears to cover most of Chamovitz's concerns.

• Lowering Environmental Standards

Perhaps one of the most popular criticisms is that the NAFTA will not prevent a Party from lowering its environmental standards in order to secure investment.¹⁷⁵

1. Enforcement

Before the Cooperation Agreement, many NAFTA opponents believed that "the agreement would make it easy for U.S. companies to relocate to Mexico to take advantage of poor environmental enforcement."¹⁷⁶ House Majority Leader Richard Gephardt demanded that the NAFTA provide "an effective remedy" to ensure such enforcement.¹⁷⁷ The Cooperation Agree-

¹⁶⁰ *Id.* annex 41(3). However, the provinces will not lose any trade benefits under the main NAFTA. See *Provinces Exempt*, *supra* note 158.

¹⁶¹ See *Id.* annex 41(4).

¹⁶² *Id.* annex 41(5). This provision looms larger after implementation because the percentile threshold may not be reached. See *Provinces Exempt*, *supra* note 158.

¹⁶³ See Cooperation Agreement, *supra* note 1, annex 41(8).

¹⁶⁴ See *Id.* art. 47.

¹⁶⁵ *Id.* art. 48.

¹⁶⁶ See *Id.* art. 49. The new Parties must gain approval of joining by their own legal processes. *Id.*

¹⁶⁷ *Id.* art. 50.

¹⁶⁸ Remarks Announcing the Completion of Negotiations on the NAFTA, 28 WEEKLY COMP. PRES. DOC. 1422 (Aug. 12, 1992).

¹⁶⁹ See *infra* notes 170-265 and accompanying text.

¹⁷⁰ Chamovitz, *supra* note 6, at *17.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Cooperation Agreement, *supra* note 1, arts. 9, 11.

¹⁷⁴ Chamovitz, *supra* note 6, at *17.

¹⁷⁵ Foronjy, *supra* note 4, at *10; Chamovitz, *supra* note 6, at *14; Lewis, *supra* note 60, at *89.

¹⁷⁶ Foronjy, *supra* note 4, at *10.

¹⁷⁷ Tim Golden, *U.S. Sees Side Accords Set for Trade Pact by August*, N.Y. TIMES, July 23, 1993, at D5.

ment addresses this concern at length by requiring each Party to enforce its own environmental laws, suggesting enforcement mechanisms, and requiring private access to enforcement proceedings and remedies.¹⁷⁸ More importantly, it provides a framework for consultations and the eventual arbitration of situations where the U.S. thinks Mexico is "winking" at enforcement of its environmental laws.¹⁷⁹ An arbitration panel will order a plan of action if it finds a lack of enforcement by a Party and the disputants cannot agree on such a plan.¹⁸⁰ When a plan is not fully implemented, the Cooperation Agreement provides for monetary penalties.¹⁸¹ These enforcement provisions give the NAFTA teeth, answering the critics of its initial form. However, not all the critics are sure the proceedings will run as planned.

A recent development on the highly polluted New River highlights concerns about Mexico's failure to enforce its environmental laws.¹⁸² The river runs into Imperial County, California after flowing north through Mexicali, Mexico in the maquiladora region.¹⁸³ Its waters, which have been labelled a Mexican sewer, are extremely toxic. Recently, sheriffs discovered a corpse in the river which appeared as though the decedent had been burned to death.¹⁸⁴ Actually, there had been no fire; the water had simply burned off the corpse's skin.¹⁸⁵

For years Imperial County officials have asked for federal assistance to no avail.¹⁸⁶ Now they are asking the government to engage the Cooperation Agreement's provisions on requiring Mexico to enforce its own environmental laws.¹⁸⁷ Experts are worried that the language: "a persistent pattern of failure to enforce," will be interpreted narrowly or that Mexican laws will not address the problems.¹⁸⁸ If either happens, the Cooperation Agreement would not provide the power to address the alleged enforcement failure.

One expert believes Mexico can take advantage of a large loophole by claiming that more pressing environmental problems require the use of its limited resources.¹⁸⁹ Officials feel the New River problem is also a test of how dedicated the Clinton Administration is to using the new framework in a potentially adversarial manner against Mexico.¹⁹⁰ If the Administration does pursue the matter, it is likely that the two governments will work out a plan of action under the Cooperation Agreement. If no such plan is constructed, neither the Council nor an arbitration panel will find for Mexico under the loophole mentioned above.

Apparently, however, the EPA has initially rejected, or at least postponed most of the County's pleas to invoke the Cooperation Agreement.¹⁹¹ The EPA explained that

NAFTA enforcement provisions "are of limited utility" now because necessary structures are not fully in place.¹⁹² They also noted that Mexico may not have any enforcement liability as of that time because the Cooperation Agreement requires a persistent pattern of non-enforcement since January 1, 1994.¹⁹³ The EPA did suggest, however, that Imperial County seek investigation of the problem by Mexico under the Cooperation Agreement provision requiring Mexico to give "due consideration" to such requests.¹⁹⁴ This decision appears to delay evaluation of the effectiveness of the NAFTA's and Cooperation Agreement's enforcement provisions.

2. Lowering Legal Protection

What happens if Mexico has no laws to enforce in this type of situation? What if Mexico decides to lower its actual regulatory or legal levels of protection? Former EPA Director William Reilly conceded to Congress that the U.S. could not impose any sanctions on goods manufactured under relaxed environmental standards in Mexico.¹⁹⁵ Criticism then focused on how the NAFTA only stated that Parties "should" refrain from lowering their environmental standards instead of using the word "shall."¹⁹⁶ The NAFTA itself provided only for consultations between the Parties, which the Council must

¹⁷⁹ See *supra* notes 102-163 and accompanying text. Congressman Robert Matsui expressed his fear that under NAFTA Mexico could "wink and not enforce its own laws to attract our businesses." Foronjy, *supra* note 4, at *10.

¹⁸⁰ See *supra* notes 128-132 and accompanying text.

¹⁸¹ See *supra* text accompanying notes 133-138.

¹⁸² See generally Marianne Lavelle, *Poisoned Waters Provide Early Test for NAFTA*, NAT'L L.J., March 21, 1994, A1.

¹⁸³ *Id.* at A22.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at A23.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (citing the comments of Robert F. Housman of the Center for International Law in Washington, D.C.) See also *supra* text accompanying note 105.

¹⁹⁰ Lavelle, *supra* note 182, at A23.

¹⁹¹ *U.S.-Mexico Border: California County's Test Rule Request Denied*, Int'l Env't Daily (BNA), Mar. 25 1994. The EPA issued its decision with a concurrent plea to improve conditions under U.S. law. *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* The public docket (oppts-211035A) and record (AR-2194001) are on file at the TSCA Nonconfidential Information Center in Washington, D.C., and may be used in an appeal to the federal courts. *Id.*

¹⁹⁴ See 59 Fed. Reg. 13721-01.

¹⁹⁵ Foronjy, *supra* note 4, at *10.

¹⁹⁶ See Chamovitz, *supra* note 6, at 14. Note that the Canadian government's proposal to use "shall" was rejected by the Bush Administration. *Id.*

aid in.¹⁹⁷ What else does the Cooperation Agreement do under these circumstances? It provides no direct sanctions as it does for enforcement failures. It does, however, provide some indirect techniques.

First, one of the goals of the Cooperation Agreement is to strengthen cooperation to "better conserve, protect, and enhance the environment" and improve existing environmental laws and regulations.¹⁹⁸ Other objectives include promoting development through "mutually supportive environmental and economic policies" and pollution preventing policies and practices.¹⁹⁹ One criticism of the NAFTA was that it provided no set of environmental goals to go with its provisions on the environment.²⁰⁰ These public goals could be used to bring domestic or international pressure to bear on the Mexican government if it relaxes regulations. The political opposition within Mexico could show that by allowing more pollution, the government is failing to live up to its rhetoric at the expense of the Mexican environment and people.

The Parties and the Commission must both prepare public reports on the state of their national environments.²⁰¹ This provision might allow the type of public scrutiny that would force the government to increase protection.

Perhaps the most important mechanism to prevent lowering environmental standards is the power of the Council to make formal recommendations regarding limits on

specific pollutants and public access to environmental information and decision-making.²⁰² This provision is persuasive in that it only requires the Parties to consider such recommendations. However, it could be an effective tool when used to bring more public pressure to bear on a recalcitrant government.

All these persuasion devices could be effective in other ways. If Mexico lowers a certain pollution standard and fails to adopt the Council's recommended standard, private organizations in either country could boycott goods made in particular polluting industries. Boycotts are also possible on investment in polluting industries.

While none of these provisions is a fail-safe to prevent lowering standards, they represent a fairly unique framework to address the problem. The Parties also have the ultimate option of withdrawing from the NAFTA altogether.²⁰³ Such an implied threat by the U.S. would likely have Mexico fairly begging to comply with its recommendations. Of course, such a threat may not be as compelling coming from Canada or Mexico to the U.S.,²⁰⁴ but with increased trade it may prove to be.

These hortatory provisions may also be preferable to mandatory ones for several reasons. There appears to be a fundamental conflict between ensuring that all Parties maintain certain protection levels and preserving national sovereignty.²⁰⁵ Note how the right to set one's own pollution levels

would be affected if the U.S. could compel Mexico to set certain levels. Additionally, the U.S. government may not have the power to limit state competition for investment.²⁰⁶ Another concern is whether a mandatory rule would be a deterrent to the Parties raising their standards in the future.²⁰⁷

Supporters of NAFTA also point to unilateral improvements by Mexico in enforcing their own laws and promulgating regulations, and that such improvement will increase as Mexico becomes more prosperous.²⁰⁸ One example of this is that while Mexico environmentally licensed only 6% of its maquiladora plants in 1987, it licensed 75% in 1992.²⁰⁹ This increase indicates that Mexico is moving towards upward harmonization.

• Environmental Provisions of the Original NAFTA

When the NAFTA was originally signed by the Bush Administration, Ambassador Carla Hills, who headed the U.S. negotiating team, claimed that it would actually "improve the environment."²¹⁰ Many who thought the increase in commerce would come at the cost of the Parties' environments challenged this claim before the Cooperation Agreement came into existence.²¹¹ Ms. Hills based her assertion both on certain environmental provisions in the NAFTA and the assumption that as Mexico becomes more prosperous it will enhance protection measures.²¹² This section of the Comment

¹⁹⁷ *Id.* See *supra* notes 30-32.

¹⁹⁸ Cooperation Agreement, *supra* note 1, art. 1(c), (f).

¹⁹⁹ *Id.* art. 1(b), (j).

²⁰⁰ See Chamovitz, *supra* note 6, at *16. See generally Bailey, *supra* note 60.

²⁰¹ See *supra* notes 47-48, 68 and accompanying text.

²⁰² See *supra* notes 26-29 and accompanying text.

²⁰³ Cooperation Agreement, *supra* note 1, art. 50. A withdrawing Party must give six months notice before doing so. *Id.*

²⁰⁴ American exports to Mexico constitute approximately one percent of the U.S. GDP. See Schwenker, *supra* note 3, at 1364 n.52.

²⁰⁵ See Stephen Fidler, *Survey of North American Free Trade*, FINANC. TIMES, May 12, 1993, at 31. See also Matthew Hoffman and James Sheehan, *NAFTA Naysayers ... and Eager Persuaders*, WASH. TIMES, Oct. 12, 1993, at A15 (opposing any supranational powers in the Commission on grounds that it will empower bureaucratic special interests of the left).

²⁰⁶ Chamovitz, *supra* note 6, at *15 (discussing difficulties in such a provision).

²⁰⁷ See *infra* text accompanying notes 213-219 for discussion of provisions in the NAFTA for environmental standard enhancement. See *supra* text accompanying notes 63-75 discussing the Agreement's related provisions.

²⁰⁸ See *infra* text accompanying notes 210-212; see also News Release, 1993 WL 438469 (E.P.A.) (noting progress in border pollution and the development of a hazardous waste tracking system).

²⁰⁹ 24 ENV'T. REP. 16 (BNA).

²¹⁰ Chamovitz, *supra* note 6, at *13.

²¹¹ *Id.*

²¹² See *Id.* at *13, *16.

very briefly reviews environmental provisions in the NAFTA text which have not already been mentioned, with the purpose of examining their weaknesses. It will then discuss how the Cooperation Agreement addresses those weaknesses.

One of the most significant provisions is the principle that the Parties should strive to "upwardly harmonize" their environmental standards, using international standards as a minimum baseline.²¹³ NAFTA also exhorts the Parties, as does the Cooperation Agreement,²¹⁴ to mutually enhance protection of the environment and human, animal, and plant life.²¹⁵ Some praise this principle as a significant improvement over the GATT,²¹⁶ which has been criticized as leaning towards downwards harmonization.²¹⁷ However, it must be noted that the NAFTA uses "should" for this principle instead of "shall" so that there is no treaty remedy for a Party's failure to act under the principle. The Cooperation Agreement does not remedy this situation, except to reemphasize the encouragement of the principle.²¹⁸ In response to a Party lowering its environmental standards, the other Parties' recourse would likely be by methods of persuasion, as explained above.²¹⁹

Another problem environmentalists saw

in the NAFTA text was a lack of any framework to control border pollution and coordinate clean-up, especially between Mexico and the U.S.²²⁰ Looking at the smoke from Mexico's new Carbon I power plant flowing into Big Bend National Park, it appears that the problems arising from international environmental impacts will be with us as long as national boundaries exist.²²¹ The Cooperation Agreement Preamble suggests an attempt to tackle environmental boundary problems.²²² It limits the right to exploit one's resources to those activities which do not affect another Party's environment.²²³ The Parties also recognize the "interrelationship" of their environments, presumably recalling problems like Carbon I.²²⁴ Other provisions require the Council to advise the Parties on the transboundary environmental impact of government projects and to encourage administrative procedures which avoid and reduce boundary pollution.²²⁵

Perhaps more importantly, each Party must ensure "interested" entities the right to due government consideration regarding investigations of possible environmental violations, as discussed above in regard to the New River problem.²²⁶ The same provision also requires appropriate access to judicial and administrative proceedings to enforce

that Party's law.²²⁷ This would apparently guarantee foreigners who suffer harm from polluters under a Party's jurisdiction access to that Party's courts and administrative proceedings. The Council must make appropriate recommendations for the provision of such access when a complainant has suffered or is likely to suffer harm in a territory other than from where the pollution emanated.²²⁸ Included is the right to request enforcement solely for the purpose of protecting the environment, without alleging any harm to the person requesting such enforcement.²²⁹ It would appear, however, that this right could be limited by changes in the Party's law of standing.²³⁰

• Bilateral Cooperation Agreements

The Border Environment Cooperation Agreement (BECA), which establishes the Border Environment Cooperation Commission (BECC),²³¹ deals much more directly with border pollution than the Cooperation Agreement.²³² Pursuant to the BECA, the U.S. Congress has also accepted membership in the North American Development Bank (NAD Bank).²³³ These bilateral organizations are designed to foster and fund cleanup of the environmentally troubled border region between Mexico and the U.S.²³⁴

²¹³ *Id.* at *13-14. See also NAFTA, *supra* note 1, arts. 712(5), 713(1), 714(1), 724. For the "international standards" the NAFTA refers to, see Charnovitz, *supra* note 6, at *13 n.66.

²¹⁴ See *supra* text accompanying notes 63-75.

²¹⁵ NAFTA, *supra* note 1, art. 906(1).

²¹⁶ General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

²¹⁷ See Charnovitz, *supra* note 6, at *14.

²¹⁸ See *supra* text accompanying notes 63-75.

²¹⁹ See *supra* text accompanying notes 197-207.

²²⁰ See Foronjy, *supra* note 4, at *4.

²²¹ See Agreements Signed, *supra* note 6. Annex 45 defines the territorial boundaries of the Parties. Cooperation Agreement, *supra* note 1, annex 45.

²²² *Id.* at Preamble.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* art. 10, and *supra* text accompanying notes 34-40.

²²⁶ See *supra* text accompanying note 194.

²²⁷ See *supra* text accompanying notes 26-101, explaining Article 6. Note that when defining access to courts, Article 6 limits such access to those with a "legally recognized interest under its law." Cooperation Agreement, *supra* note 1, art. 6(2).

²²⁸ Cooperation Agreement, *supra* note 1, art. 10(9).

²²⁹ *Id.* art. 6(3)(c).

²³⁰ See *id.* art. 6. Because the access is limited to those with a "legally recognized interest," the Parties could apparently rewrite their laws to grant judicial access for such suits only to their own citizens. See *id.*

²³¹ See *supra* text accompanying notes 17-18.

²³² See 19 U.S.C. § 3473 (1993) (legislation implementing the BECA and BECC).

²³³ See The North American Free Trade Implementation Act, § 541, 1993 WL 561211, *7-9 (N.A.F.T.A. database) [hereinafter *NAFTA Implementation*].

²³⁴ See generally *id.* See also Statement of Carol M. Browner, 1993 WL 438469 (E.P.A., available in FENV-NR database), at *1 (announcing the establishment of the BECA).

The BECC will allocate funds, some of which will be provided through the NAD Bank, for projects to improve the border environment.²³⁵ Congress has allocated approximately \$56 million to fund the NAD Bank in fiscal year 1995.²³⁶ The BECC will also seek to avoid further deterioration in this region which will experience rapid growth with the reduction of trade barriers.²³⁷ It is expected that the BECC and NAD Bank will be operational by the fall of 1994.²³⁸

Under the BECA, the U.S. President will be allowed to use some of the NAD Bank's funds to subsidize designated community adjustment and investment programs in the border region.²³⁹ Also, the President shall establish a public advisory committee which will provide advice to the President regarding the programs.²⁴⁰ It will be comprised of representatives of business, the poor, and other non-governmental organizations.²⁴¹ By mixing various groups together to solve tough problems, this amounts to another entity accomplishing the type of environmental remediation envisioned by the critic Chamovitz.²⁴²

• Sovereignty

Another important issue to environmentalists is whether the NAFTA will invade national sovereignty by preempting federal

or state environmental measures as barriers to trade.²⁴³ Ambassador Hills claimed that there will no preemption under the NAFTA and that individual state and federal governments will be able to set their own environmental standards.²⁴⁴ But a closer look at the NAFTA's rules on distinguishing trade barriers from environmental measures belies dismissing the issue so easily.²⁴⁵ Though the Cooperation Agreement hardly speaks to these issues raised by the NAFTA, they are included here because they are so integral to the overall environmental scheme of the Parties and because they have not been subsequently addressed.

The NAFTA allows each Party to set its own levels of environmental protection save for two exceptions.²⁴⁶ The first exception occurs when there are "arbitrary or unjustifiable distinctions in such levels in different circumstances, where such distinctions result in arbitrary or unjustifiable discrimination against a good of another Party or constitute a disguised restriction on trade."²⁴⁷ The second exception is that protection regarding plant and animal disease and pests must take into account its economic effects as well as the cost-effectiveness of other possible means.²⁴⁸ Further, such protection measures must be "necessary" to achieve the Party's chosen level of protection and must

be based on "scientific principles."²⁴⁹ As noted above, the Cooperation Agreement requires "high levels" of protection and Party consideration of the Council's recommended pollutant levels, but it provides no penalties for failure to set such high levels.²⁵⁰

Some environmentalists fear that NAFTA adjudicators will narrowly interpret the exceptions above, just as GATT adjudicators have interpreted similar provisions in the GATT.²⁵¹ However, there are some explicit differences between the two treaties which make the NAFTA significantly more "green."

First, the NAFTA has no parallel to the GATT's requirement that protection measures be the "least restrictive" to trade.²⁵² Nor is there a parallel provision to the GATT's requirement to consider risks to which people voluntarily expose themselves while setting national protection levels.²⁵³ Further, the NAFTA requirement to consider cost-effectiveness is limited and the "scientific basis" requirement is stricter than the GATT's parallel provisions.²⁵⁴ There is, however, one manner in which the NAFTA goes further to regulate environmental measures than the GATT. The NAFTA precludes arbitrary discrimination where "identical or similar conditions" exist, whereas the GATT forbids it only under identical conditions.²⁵⁵ None-

²³⁵ *Id.* at *7. The BECC will ensure that these projects themselves meet necessary environmental standards. *Id.*

²³⁶ *Id.* § 541(b) at *8.

²³⁷ *Id.* at *7.

²³⁸ *New Commission Predicted to Feel Effect of Environmental Justice Executive Order*, 17 INT'L ENVTL. REP. (BNA) 175 (1994).

²³⁹ NAFTA Implementation, *supra* note 233, §543(a) at *8.

²⁴⁰ *Id.* §543(b) at *9.

²⁴¹ *Id.*

²⁴² See *supra* text accompanying notes 170-172.

²⁴³ See Chamovitz, *supra* note 6, at *8-*10.

²⁴⁴ *Hearing on the North America Free Trade Agreement Before the House Com. on Ways and Means*, 102d Cong., 2d Sess. (Sept. 9, 1992) (prepared testimony of Ambassador Carla Hills).

²⁴⁵ See generally Chamovitz, *supra* note 6, at 5-13.

²⁴⁶ NAFTA, *supra* note 1, art. 712(2).

²⁴⁷ *Id.* art. 715(3).

²⁴⁸ *Id.* art. 715(2).

²⁴⁹ *Id.* arts. 709, 712(1), 712(3) and (5).

²⁵⁰ See *supra* text accompanying notes 71-75.

²⁵¹ See Chamovitz, *supra* note 6, at *5-6. Because the NAFTA incorporates the GATT by reference, some fear the GATT standard of review will be used by NAFTA adjudicators. See NAFTA, *supra* note 1, art. 103(1)(reaffirming the parties' obligations under GATT).

²⁵² See Chamovitz, *supra* note 6, at *6.

²⁵³ See *Id.*

²⁵⁴ *Id.*

²⁵⁵ See *Id.* See also NAFTA, *supra* note 1, art. 712(4).

²⁵⁶ See Chamovitz, *supra* note 6, at *6, *9.

theless, NAFTA proponents maintain that these provisions are less likely to work a preemption of U.S. regulations than existing GATT measures would be.²⁵⁶ The U.S. implementing legislation appears to address this concern explicitly by stating that no provisions of the NAFTA conflicting with federal law shall have effect.²⁵⁷ However, this appears to contradict the dispute resolution measures in both the GATT and NAFTA whereby a national environmental regulation can be found to violate those agreements' rules against artificial trade barriers.

There are separate problems with preemption of state laws under both the NAFTA and GATT. Under the former, states do not have Party standing.²⁵⁸ Though the NAFTA language may appear to do more to prevent states from setting their own levels than the GATT does, this may not be true.²⁵⁹ Yet a question does linger, as in the GATT,²⁶⁰ as to whether the treaty provisions will have the power to preempt state environmental laws.²⁶¹

Before the NAFTA was adopted, critics suggested adding language to the implementation laws which would prevent preemption of state laws.²⁶² When Congress enacted the NAFTA, it decided to establish a consultation process between the President and the states to achieve state law conformity with the NAFTA.²⁶³ These consultations will identify possible conflicts on an ongoing

basis but no state law will be declared invalid unless the federal government brings an invalidation action itself.²⁶⁴ This language appears to leave more questions open regarding the possibility of preemption. It appears that the federal government has the power to invalidate state regulations but is not required to use it. If this is true, it would appear to create a loophole for the state or federal government to avoid preemption under the NAFTA. It is unclear what would happen if the U.S. defies a NAFTA decision attempting to invalidate such a law. However, in such decisions under the GATT, the U.S. has generally acquiesced without formally recognizing that such power is vested in a dispute panel.²⁶⁵

CONCLUSION

The Cooperation Agreement has significant strengths and weaknesses. In that it provides a framework for the Parties to consult with each other in environmental matters and sets forth laudable goals in those matters, it is a milestone achievement. By requiring full enforcement of existing laws, it also appears to be highly effective and an improvement over the status quo. As far as addressing the immediate and growing border pollution problem, it generally abstains, but provides some encouragement for the bilateral agreements which directly address those problems. In striking a balance be-

tween removing trade barriers and retaining national sovereignty, the Cooperation Agreement generally does not address the issue, leaving the meaning of the NAFTA somewhat vague. As a result the NAFTA perhaps leans more toward a free trade perspective than many would like to see, as the Bush administration indicated it would.²⁶⁶

The Cooperation Agreement could be improved by adopting a more clearly defined standard of review to determine whether an environmental provision is valid under the NAFTA review measures. Another improvement would be to clarify the issue of preemption, especially on the state law level. The implementing laws do not adequately do this. Overall, the whole NAFTA, including the bilateral deals, will certainly improve the environment, at least in border areas. It should provide an incentive for the Parties to effectively enforce their environmental laws, which Mexico has only recently done. The Cooperation Agreement will provide a framework for improving such enforcement and increasing technical knowledge of environmental problems. It will provide an innovative public forum to discuss international problems like the emissions from the Carbon I plant and to bring political pressure. The NAFTA itself also should improve the depressed Mexican economy and begin to provide the resources needed to limit pollution and clean it up.

²⁵⁷ 19 U.S.C. § 3312(a)(11) (1993).

²⁵⁸ See Chamovitz, *supra* note 6, at *9.

²⁵⁹ *Id.*

²⁶⁰ See *Id.* at *9, referencing a recent decision under the GATT which the author thinks indicates the power of preemption in the GATT provisions.

²⁶¹ See *Id.* at *10.

²⁶² *Id.*

²⁶³ 19 U.S.C. § 3312(b)(1).

²⁶⁴ *Id.* 19 U.S.C. § 3312(b).

²⁶⁵ But see Chamovitz, *supra* note 4, at *9 (discussing the *Beer II* Gatt decision suggesting preemption.)

²⁶⁶ See *supra* text accompanying notes 168, 243-265.